Supreme Court, U.S.
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No. 91-143

In the Supreme Court of the United States

OCTOBER TERM, 1991

RONALD TOBIN AND CLIFFORD ROGER ACKERSON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether exigent circumstances justified the entry by law enforcement officers into petitioner Ackerson's house.

2. Whether petitioner Ackerson was acting voluntarily when he opened the door of his house in response to law enforcement officers' request.

3. Whether, having granted petitioner Tobin's request for rehearing en banc, the court of appeals lacked authority to affirm the district court's denial of petitioner Ackerson's motion to suppress.

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OPINIONS BELOW

The opinion of the court of appeals sitting en banc (Pet. App. 1-28) is reported at 923 F.2d 1506. The panel opinion of the court of appeals (Pet. App. 29-51) is reported at 890 F.2d 319.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 1991. A petition for rehearing was denied on May 31, 1991 (Pet. App. 52-53). The petition for a writ of certiorari was filed on July 22, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners each entered a conditional plea of guilty to one count of possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Each was sentenced to 15 years' imprisonment and fined $100,000. The court of appeals affirmed (Pet. App. 1-28).

1. On March 19, 1986, while conducting surveillance unrelated to this case in a residential neighborhood of Miami, Florida, agents of the Drug Enforcement Administration and the U.S. Customs Service saw a Mercury Marquis automobile stop abruptly in front of petitioner Ackerson's house and then back into the driveway. Petitioner Tobin got out of the car and ran to the front door of the house. Ackerson opened the front door of the house and let Tobin in. A few minutes later, Ackerson lifted the door of the garage at the rear of the house and looked up and down the street. Tobin emerged from the garage, likewise scanned the street, and took three plastic tubular bags from the trunk of the Mercury. The bags were about four feet long and filled with smaller packages that were visible from the outside. Tobin hurriedly carried the bags into the garage. The agents could see a station wagon parked inside the garage and a pickup truck on the lawn of the house. Pet. App. 2.

The agents concluded that the bags probably contained cocaine. One of the agents went up to the front door of Ackerson's house, knocked on it, and initially received no answer. He continued knocking for three or four minutes and called out that he was a police officer and wanted to talk to the occupants of the house. When Ackerson opened the door, the agent identified himself and said that he had just seen

someone take what he believed was cocaine out of the car in the driveway and put it in Ackerson's garage. Ackerson denied that anyone had recently backed into his driveway and denied that anyone else was in the house. Tobin then came to the door and denied having driven the Mercury to the house, even after the agent said that he had seen Tobin do so. As the agent stood in the doorway, he smelled marijuana inside the house. Pet. App. 3; see also C.A. Record Excerpts 14-17.

The agent said he thought they should go to the garage and see what was there. Ackerson led the agent, Tobin, and a second agent through the back of the house and into the garage. In the garage, the agents saw the three bags that Tobin had taken out of the Mercury. One bag was open and clearly contained cocaine. The agents then arrested Ackerson and Tobin and conducted a protective sweep of the house. They found three bales of marijuana in one of the bathrooms and $775,000 in cash in the station wagon in the garage. Pet. App. 3-4; C.A. Record Excerpts 17-20.

2. The district court denied petitioners' motions to suppress the evidence found in Ackerson's house and garage. The court held, first, that the agents were justified in entering the house without obtaining a warrant. The court determined that the agents had probable cause to believe that drugs would be found in the house based on their surveillance, the smell of marijuana coming from inside the house, and petitioners' denial of what the agents had witnessed. The court also determined that, in light of the "strong possibility" that the drugs would be destroyed or removed before a warrant was obtained, exigent circumstances justified the search of the house and garage. C.A. Record Excerpts 48. The court further

held that the marijuana in the house was discovered during a valid security sweep. Finally, the court held that neither petitioner had standing to contest the search of the station wagon in the garage. *Id.* at 45-50.

3. A panel of the court of appeals affirmed in part and reversed in part. Pet. App. 29-51. The panel affirmed the denial of Tobin's motion to suppress, holding that Tobin lacked standing to contest the search. *Id.* at 34-41. The panel reversed as to Ackerson, however. *Id.* at 41-50. It found that Ackerson did not open the door voluntarily; rather, it held that the agents had "demanded entry under color of authority" by "knock[ing] too long and too adamantly" on the door and shouting their request to speak with Ackerson. *Id.* at 43, 46. The court also found that exigent circumstances did not justify the search. *Id.* at 50.

4. Tobin sought rehearing and rehearing en banc on the issue of whether he had standing to contest the search. The court of appeals granted rehearing en banc and vacated the panel opinion. 902 F.2d 821 (1990). The court of appeals, sitting en banc, subsequently affirmed the district court's denial of each petitioner's motion to suppress.[1]

The court held, first, that the search of petitioner Ackerson's house was permissible because it was based on probable cause and exigent circumstances. The court determined that the agents had probable cause to believe that petitioners were engaged in illegal drug activity after the agents saw petitioners furtively transfer the plastic bags from the car to the garage. Pet. App. 7. The court further deter-

[1] The court of appeals assumed without deciding (Pet. App. 6) that both Ackerson and Tobin had standing to contest all aspects of the searches conducted by the agents.

mined that the agents were justified in entering the house to search for the drugs because exigent circumstances justified their search. *Id.* at 7-9. The court emphasized that "the 'presence of contraband without more does not give rise to exigent circumstances.'" *Id.* at 8 (quoting *United States* v. *Torres*, 705 F.2d 1287, 1297, vacated and remanded on other grounds, 718 F.2d 998 (11th Cir. 1983)). Instead, the court observed, "[t]he test whether exigent circumstances exist is an objective one," requiring an inquiry into "whether the facts * * * would lead a reasonable, experienced agent to believe that evidence might be destroyed before a warrant could be secured." Pet. App. 8 (internal quotation marks omitted). The court held that the test was satisfied here. The court reasoned that the presence of at least two persons in the house and three vehicles outside the house raised the possibility that someone would depart with the drugs before the agents could obtain a warrant. *Ibid.* In addition, the court observed, "the agents could reasonably conclude from [petitioners'] hurried actions and furtive looks that [petitioners] were either aware or afraid that someone was watching them." *Id.* at 9. Based on those facts, the court concluded, "exigent circumstances [existed] which would permit a warrantless search even prior to the approach to the house." *Ibid.*

The court held, in the alternative, that the search was permissible even assuming the agents did not have probable cause when they approached the house. The court reasoned that, before the agents approached the house, they had at least a reasonable suspicion that drugs would be found inside the house. Pet. App. 10. Although reasonable suspicion cannot justify a warrantless search, the court observed, "it

can justify the agents' approaching the house to question the occupants." *Ibid.* The court noted that after Ackerson opened the door and the agents smelled marijuana, the agents plainly had probable cause. Exigent circumstances also existed at that point, the court determined, since "[petitioners] and anyone else who might have been present in the house would have been aware of the agent's suspicions at that moment." *Ibid.* The court rejected petitioners' argument that the agents created the exigent circumstances by "us[ing] their position to demand entry." *Id.* at 11. The court observed that the agents who approached the house were dressed in plain clothes and displayed no weapons. *Ibid.* Moreover, the court noted, the agent who called out at the door "did not use the imperative" but instead "phrased his words in the form of a request." *Id.* at 12.[2]

Judge Clark, joined by two other judges, dissented. Pet. App. 14-28. The dissenting judges assumed that the agents had probable cause to believe that drugs would be found in the house, but they did not believe that exigent circumstances justified the entry (*id.* at 15-21) or that Ackerson opened the door voluntarily (*id.* at 21-27).

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[2] The court of appeals also rejected petitioners' challenges to the scope of the protective sweep of the house and to the search of the station wagon. Pet. App. 13-14. Petitioners do not renew those challenges in this Court.

ARGUMENT

1. Petitioners concede (Pet. 6) that the agents had probable cause to believe that Ackerson's house contained contraband, but they contend (Pet. 6-11) that there were no exigent circumstances justifying a warrantless entry at the time the agents approached the house. In *Minnesota* v. *Olson*, 110 S. Ct. 1684 (1990), this Court endorsed the principle that exigent circumstances exist when the police have probable cause to believe that the destruction of evidence is imminent. *Id.* at 1690; see also *Vale* v. *Louisiana*, 399 U.S. 30, 34-35 (1970). The court of appeals in this case applied the same principle in holding that the police may search without a warrant when the facts known to the police would lead a reasonable, experienced officer to conclude that evidence might be destroyed before a warrant could be obtained. Pet. App. 8. The court's decision thus represents a "fact-specific application of the proper legal standard," *Olson*, 110 S. Ct. at 1690. For that reason, it does not warrant further review.

The court of appeals' finding of exigent circumstances was correct. As the court of appeals found, petitioners acted as if they knew they might be under surveillance; the law enforcement agents did not know how many persons might be in Ackerson's house, but they knew that three cars were parked around the house; and the agents did not have enough personnel to cover the back of the house. Thus, it was reasonable for the agents to believe that petitioners or their confederates might attempt to remove the cocaine before the agents could obtain a warrant. Pet. App. 8-9.

Contrary to petitioner's claim (Pet. 6-9), the courts of appeals do not employ conflicting standards

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in finding exigent circumstances. Other courts of appeals have applied substantially the same standard that the court used in this case. See *United States* v. *Grissett*, 925 F.2d 776, 778 (4th Cir.) (question is whether an "objective officer could reasonably believe" that "evidence might be destroyed"), cert. denied, 111 S. Ct. 2245 (1991); *United States* v. *Munoz*, 894 F.2d 292, 296 (8th Cir.) (officers must have a "reasonable belief that evidence of the crime was in imminent danger of removal or destruction"), cert. denied, 110 S. Ct. 1934 (1990); *United States* v. *Zabare*, 871 F.2d 282, 291 (2d Cir.) (test is whether "reasonable, experienced agents * * * would have been justified in concluding that the destruction of contraband was imminent") (internal quotation marks omitted), cert. denied, 110 S. Ct. 161 (1989); *United States* v. *Rodriguez*, 869 F.2d 479, 485 (9th Cir. 1989) ("exigent circumstances exist to justify a warrantless entry if officers act on probable cause, in good faith, and with a reasonable belief, from the totality of the circumstances, that evidence or contraband will be imminently destroyed"); *United States* v. *Sangineto-Miranda*, 859 F.2d 1501, 1512 (6th Cir. 1988) (officers must have "an objectively reasonable basis for concluding that the loss or destruction of evidence is imminent"); *United States* v. *Socey*, 846 F.2d 1439, 1445 (D.C. Cir.) (exigent circumstances justify an entry when police have "an objectively reasonable basis for concluding that the destruction of evidence is imminent"), cert. denied, 488 U.S. 858 (1988); *United States* v. *Napue*, 834 F.2d 1311, 1326 (7th Cir. 1987) ("[e]xigent circumstances exist where the police have an objective and reasonable fear that evidence is about to be destroyed"); *United States* v. *Moore*, 790 F.2d 13, 15 (1st Cir. 1986)

("exigent circumstances exist when government agents reasonably believe that evidence will be destroyed"); *United States* v. *Rubin*, 474 F.2d 262, 268 (3d Cir.) (officers must "reasonably conclude that the evidence will be removed or destroyed"), cert. denied, 414 U.S. 833 (1973). In short, the courts of appeals differ only in the verbal formulations used to describe the standard for determining whether exigent circumstances exist. Those minor variations in language do not reflect a difference in the standard applied. Review by this Court is therefore unwarranted, especially in light of the Court's recent clarification of the applicable standard in *Olson*.

Nor is it true, as petitioners assert (Pet. 6), that there is a conflict among the circuits over whether "narcotics are a special class of evidence which because of their destructibility create a special type of 'exigency.'" Several courts, like the court of appeals in this case, have observed that the need to preserve evidence is heightened when narcotics are involved. See *United States* v. *Grissett*, 925 F.2d at 778; *United States* v. *Sangineto-Miranda*, 859 F.2d at 1511-1512; *United States* v. *Socey*, 846 F.2d at 1444-1445; *United States* v. *Rubin*, 474 F.2d at 268-269. Those courts have accordingly cited the ease with which narcotics can be destroyed as one factor relevant to determining whether exigent circumstances exist. Cf. *Schmerber* v. *California*, 384 U.S. 757, 770-771 (1966). Contrary to petitioners' contention (Pet. 7 n.1) however, no court has adopted a *per se* rule under which the mere presence of narcotics is dispositive. Nor did the court of appeals do so in this case. To the contrary, the court emphasized that "the presence of contraband without more does not give rise to exigent circumstances." Pet. App. 8 (internal quotation marks omitted). In short, petitioners fail to identify a con-

flict among the courts of appeals that warrants this Court's attention.[3]

2. Petitioners next contend (Pet. 11-14) that the court of appeals erred in finding, as an alternative basis for upholding the search, that petitioner Ackerson opened the door of his house voluntarily. That fact-bound claim does not merit review.

A consent to search is valid if it is freely and voluntarily given. See *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 222-223 (1973). A consent to search that is coerced by a show of authority is invalid, as the court of appeals recognized. Pet. App. 11. See *Bumper* v. *North Carolina*, 391 U.S. 543, 550 (1968). Applying these well-settled principles, the court of appeals observed that the agent who knocked on Ackerson's door "did not use the imperative" and that, instead, "he phrased his words in the form of a request." Pet. App. 12. The court also found it relevant that only two agents approached the door and that they were in plain clothes and did not display their weapons. *Id.* at 11. Under these circumstances, the court reasonably concluded that the agents did not use a show of authority to obtain entry into the house.

Contrary to petitioners' contention (Pet. 12-13), the court's conclusion does not conflict with this

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[3] Petitioners' reliance (Pet. 8) on *Hall* v. *Shipley*, 932 F.2d 1147 (6th Cir. 1991), and *United States* v. *Tracy*, 835 F.2d 1267 (8th Cir.), cert. denied, 486 U.S. 1014 (1988), to support the existence of a conflict is misplaced. At issue in those cases was whether the police were excused from complying with the knock and announce statute, 18 U.S.C. 3109, when executing warrants to search for narcotics. That issue obviously is not present here. Petitioners also err in relying (Pet. 7 n.1) on *United States* v. *Munoz-Guerra*, 788 F.2d 295 (5th Cir. 1986). The court there held, on facts very different from those in the present case, that there were no exigent circumstances to justify a warrantless search. *Id.* at 297-298.

Court's decision in *Johnson* v. *United States*, 333 U.S. 10 (1948). In *Johnson*, police officers smelled opium coming from a hotel room. One of the officers then knocked on the hotel room door and, after the defendant opened the door, immediately entered and told the defendant, "I want you to consider yourself under arrest because we are going to search the room." *Id.* at 12. That statement left the defendant in *Johnson* with no choice but to acquiesce in the ensuing search. Because the officer had declared that the police were "going to" search with or without the defendant's consent, the Court in *Johnson* concluded that consent "was granted in submission to authority." *Id.* at 13.

This case is quite different from *Johnson*. The agents in this case did not declare that they were "going to" enter and search the house, nor did they take any other action amounting to a show of official force. Petitioners' reliance on *Johnson* is therefore misplaced.[4]

3. Ackerson contends (Pet. 14-15) that the court of appeals sitting en banc had no authority to reverse the panel decision in his favor. The en banc court simply reviewed, and affirmed, the district court's denial of

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[4] Petitioners' reliance (Pet. 13) on *Florida* v. *Bostick*, 111 S. Ct. 2382 (1991), is likewise unavailing. *Bostick* is inapposite here, for it involved a different legal issue in a different factual setting, namely, whether an encounter in a public place between the police and the defendant involved a "seizure" under the Fourth Amendment. *Id.* at 2386. Petitioners' claim that the court of appeals' decision conflicts with *United States* v. *Shaibu*, 920 F.2d 1423 (9th Cir. 1990), is even wider of the mark. That case concerned whether the defendant impliedly consented to the entry of police officers into his apartment. *Id.* at 1425. Thus, the issue in *Shaibu* was whether consent was given at all, not the quite different question whether the consent that was given was coerced.

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CLUSION

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